Federal Court of Australia
District Registry: New South Wales
Division: General
On appeal from the Federal Court of Australia

No. NSD 903 of 2019

Jack de Belin
Applicant
Australian Rugby League Commission Ltd ACN 003 07 293 and another
Respondents

RESPONDENTS' SUBMISSIONS

A. INTRODUCTION AND SUMMARY

1. Over the last three years, the elite men's rugby league competition in Australia and New Zealand (the **NRL Competition**), overseen by the Respondents, the Australian Rugby League Commission Ltd (**ALRC**) and the National Rugby League Limited (**NRL**), has been beset by a series of scandals involving player misconduct, or allegations of player misconduct. On average, between 2015 and 2018 an NRL player was implicated in an off-field scandal every 22 days.[1] Many of these incidents have involved (or allegedly involved) violent assaults, particularly against women. Predictably, the image and standing of the game has been increasingly undermined by these events. This problem worsened again over the 2018 off-season, with a string of high-profile players accused of serious acts of violence and misconduct against women, leading it to be branded the "*Summer from Hell*". One of those players was the Appellant, Jack de Belin. Mr de Belin was charged with aggravated sexual assault in company on 13 December 2018, but the full panoply of allegations against him was only revealed on 12 February 2019. This led to a further wave of condemnation and negative reporting. Unsurprisingly, the game's fans, sponsors and community partners had had enough.

2. On 28 February 2019, the Respondents announced that any player in the NRL Competition charged with a serious criminal offence, particularly one of violence against women or children, would now be stood down from playing on full pay until his charge was determined. This change was formally implemented on 11 March 2019 (the **New Rule**).

3. A chorus of support for the change followed. For example, the CEO of Our Watch, an organization established to change attitudes in relation to violence towards women and children, observed that the Respondents had "*come up with a proposal that is fair and serves to make*

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1 Exhibit A10 [**Pt B tab 20, 3**].

a clear statement to all", and hoped that it would serve as a catalyst for other sports in the country.[2] White Ribbon, Australia's campaign to prevent men's violence against women, congratulated the NRL for listening to the community.[3] Telstra, the naming rights sponsor of the NRL, having a week earlier privately complained of reputational damage to their brand and demanded tough action,[4] publicly congratulated the NRL "*on their strong stance, reflecting community standards and moving closer to the values that Telstra upholds*".[5] [redacted][6] Not a single community or commercial partner objected to or made any criticism of the change.

4. The Appellant nevertheless contends that, in fact, there was no danger to the NRL posed by allegations of offensive player behaviour, or alternatively that the New Rule was not a sensible way of addressing that danger. The Appellant contends that the honestly held views of the administrators of the game as to the dangers faced by it (J[225]) were somehow misplaced. The criticisms advanced by the Appellant are unfounded. The evidence before the primary judge was compelling and provided a firm basis on which to conclude, over a comprehensive 138-page judgment [**Part A tab 11**], that the New Rule was reasonable. In the Respondents' submission, that judgment is correct and deserves to be upheld in its entirety.

B. FLAWS IN THE APPELLANT'S APPROACH

5. The Judge's conclusions were based primarily on findings of fact, made after a four-day trial during which there was extensive cross-examination of the Respondents' witnesses, including its Chief Executive Officer (Todd Greenberg) and Chief Commercial Officer (Andrew Abdo). This Court will no doubt be cautious to ensure that it takes properly into account the advantages afforded to the primary judge that it does not have, including being able to see the witnesses give their evidence, and having a much greater opportunity to consider the entirety of the evidence before the Court, rather than only those items now cherry-picked by the Appellant: see *Fox v Percy* (2003) 214 CLR 118 at 124-126. Moreover, an appeal court should not interfere with the primary judge's findings of fact unless they are demonstrated to be wrong

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2 Exhibit R2, tab 26, p. 664 [**Pt B tab 38.28, 664**]; J[200].
3 Exhibit R2, tab 25, p. 663 [**Pt B tab 38.27, 663**]; J[199].
4 Confidential Exhibit R7, tab 7 [**Pt B tab 43.7, 28**]; J[156], [199].
5 Abdo 1 at [68] [**Pt B tab 10, 16**]; Exhibit R6, tab 23, at p. 1916 [**Pt B tab 42.43, 1916**]; J[199].
6 See, generally, Confidential Exhibit R7, tab 7 [**Pt B tab 43.7, 19, 21, 25**]; J[156], [199].

by *"incontrovertible facts or uncontested testimony"*, or *"glaringly improbable"* or *"contrary to compelling inferences"*: *CCL Secure Pty Limited v Berry* [2019] FCAFC 81 at [20].

6. It is unfortunate, particularly in this context, that the Appellant mischaracterizes many of the Judge's findings throughout his submissions. Caution is therefore required when considering the Appellant's purported summaries and paraphrasing of the judgment. For example:

(1) Appellant's Submissions (**AS**) [11] sets out a serious of propositions for which the Appellant contends there was no evidence. The intended implication, it would seem, is that these propositions were the reasons of the Judge. However, the Judge did not purport to make any findings to this effect. For example, the Judge did not make any findings that a reasonable member of the public would think that Mr de Belin had actually engaged in sexual assault, or that existing sponsors had expressly stated that their sponsorship would be withdrawn if Mr de Belin was permitted to play. The suggestion that the Judge simply adopted *"assertions"* by the Respondents' witnesses about the necessity of the New Rule bears no resemblance to the content of the judgment. As to the Appellant's purported summary of certain aspects of the Respondents' submissions before the Judge at AS[6]-[10], the summary is not only inaccurate and incomplete but, in any event, the wrong focus of inquiry where the Judge did not just adopt the Respondents' submissions wholesale.

(2) The Appellant's purported summary of the judgment at **AS**[20] does not accurately reflect the Judge's careful and considered reasoning, whether in the paragraphs cited or otherwise. By way of example only, the Judge did not *"in substance"* simply accept the *"contentions"* inaccurately paraphrased at AS, [6]-[10]; in relation to (b), it was the association with acts of sexual violence that the Judge found was anathemata to the values of the NRL and its commercial partners at J[260], and the charges against Mr de Belin that were antithetical to its values at J[263(1)], both of which are ignored by the Appellant; in relation to (c) the findings **at** J[261]-[263] concerned the dangers faced to the Respondents' interests, not the tarnishing of its reputation by allowing Mr de Belin to continue to play; as to (d) the Judge's finding at J[263(1)] was a risk of alienation of fans, not that it would necessarily or universally occur; as to (e), the position of sponsors was clear from the evidence and was not simply inferred (as the Appellant seems to suggest) from conclusions about possible reactions of members of the public to Mr de Belin's charges.

(3) The Appellant's purported summary of the judgment at **AS**[34] **is** also incomplete and inaccurate. For example, the Judge found at J[260] that a reasonable member of the public *"may think"* that there was a reasonable and probable basis for the charge, and therefore a

"*risk*" that Mr de Belin is guilty, not the blanket proposition (as asserted by the Appellant) that "*members of the public would associate Mr de Belin with his charge*"; at J[263], contrary to the Appellant's assertion the Judge did not refer to the failure of the NRL to take action at all (this was considered separately in J[264]), and observed that the NRL's reputation had been tarnished not just by the allegations against Mr de Belin (as the Appellant asserts) but by all of those during the summer off-season; the Appellant then cites J[263]-[265] for the Judge stating that "*reasonable persons would think that the NRL was tacitly or expressly supporting acts of sexual violence against women*", but this is not stated there; finally, the Appellant suggests that the Judge's findings were based on the proposition that reasonable members of the public thought the NRL was "*condoning or promoting acts of sexual violence against women*", but what the Judge actually found at J[264] was that there was a need for the NRL to be seen to "*publicly dissociate itself completely from conduct such as that alleged against Mr de Belin*". The Appellant's flawed summary then creates a false basis for his submissions at AS[35].

(4) At AS[36], the Appellant asserts that the Judge made findings that "*fans, sponsors and broadcasters would be alienated or terminate or reduce their investment the game*". No reference is given to the judgment here, and this is not what the Judge found (as considered below).

7. The Appellant also contends that a small subset of the evidence relied on by the Judge was wrongly admitted[7] and argues that another small subset of the evidence was misused by the Judge.[8] As explained below, however, neither assertion is properly particularized or reasoned, as it should have been in an appeal of this nature.

8. Finally, the Appellant's purported summaries or paraphrasing of the judgment do not address large swathes of the rest of the evidence before the Judge and relied on in Her Honour's judgment. Some of these are considered below.

C. BACKGROUND TO THE NEW RULE

9. At the outset, it is important to highlight various parts of the Judge's reasoning that are not challenged by the Appellant, but which underpin the conclusions reached by the Judge.

10. Since 2015, there have been approximately 66 scandals relating to the behaviour of players in the NRL Competition. These included 21 allegations of assault, 11 of the which involved assault of a woman: J[127]. These are outlined in detail in, for example, the Appellant's Exhibit A10, in which the reporter noted "*[b]etween 2015 and 2018, an NRL player was implicated in an off-*

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7 Notice of Appeal, para. 1(g), Schedule B **[Pt A tab 12, 4, 14]**.
8 Notice of Appeal, para. 1(f), Schedule A **[Pt A, tab 12, 4, 13]**.

field scandal every 22 days. The frequency of these scandals encourages the idea rugby league is a game played by thugs and boofheads".

11. In the so-called "*Summer from Hell*" over the 2018-2019 off season, there was a further flood of serious allegations and charges made against NRL players, many of which were for physically assaulting women, including high-profile players Ben Barba, Dylan Walker, Jarryd Hayne, Zane Musgrove and Mr de Belin: J[131]. The 17 incidents between 4 September 2018 and 20 February are set out in Exhibit A11.

12. These allegations and incidents were contrary to the game's values and attracted extensive negative media publicity which the Judge found was, as one would expect, highly damaging to the reputation of the NRL Competition and gave rise to significant concerns amongst those responsible for managing the game: J[131], [132], [136].

13. Mr de Belin was charged with aggravated sexual assault in company on 13 December 2018: J[137]. The charging of Mr de Belin attracted more extensive negative reporting throughout Australia and New Zealand. For example, between the date of his charge and 6 March 2019, there were 27,858 reports that mentioned Mr de Belin by name: J[138].

14. However, these reporting figures spiked significantly on 12 February 2019 when Mr de Belin was required to attend Wollongong Local Court in relation to his criminal charge: J[138]. Extensive details of the allegations, which were not previously publicly available, were then published: J[140]. For example, in the Nine News television report of the hearing, the details of the alleged attack were described as "*shocking*": J[139], Exhibit R4. Specific particulars of the confronting and graphic allegations that had been made permeated the reporting: J[141]-[142]. It was not disputed at trial that the seriousness of the charge, and the extent of the negative reporting which it attracted, were unprecedented: J[261].

15. This Court is plainly not in a position to analyse all of the extensive evidence before the Judge in detail. Nevertheless, the Respondents do invite it to peruse some of this material (particularly that at Exhibit R2, tabs 4 and 5, Exhibit R6, Tabs 10, 12, 13, 14) to get an idea of the damaging nature of the reporting on the game that was taking place at this time.

16. The Appellant contends on appeal at AS[62] that "*[t]he real issue arising from the 'Summer from Hell' is one of isolated examples of proven player indiscretion, which had aggregated over the offseason*". This is incorrect, as the outline of allegations at J[131] (which is a finding of fact) demonstrates. Moreover, the characterization of these matters as "*isolated*" examples of "*indiscretions*" is not an attractive position in light of the extent and seriousness of what was being alleged. Indeed, in

February 2019 Mr Abdo described what had occurred, in a communication with a sponsor, as [redacted] This was the context in which the New Rule was adopted.

D. GROUND 1: LEGITIMATE INTERESTS

17. Contrary to the Appellant's submissions at AS[20], the legitimate interests that the Respondents sought to address by the New Rule were identified at J[242]. These included the aims:

(1) to foster, develop and provide adequate funding for Rugby League from the junior to the elite levels and to ensure the financial viability of the Clubs;

(2) to foster the NRL Competition, as the elite national and international level of the game, and to ensure that it is a strong and competitive competition;

(3) to protect and enhance the image and reputation of the NRL, related, representative and other competitions, and of the clubs and the game of rugby league; and

(4) to promote the game as inclusive and, in particular, as respectful, attractive and welcoming to female fans and players.

18. These findings are, with respect, incontrovertible (and see also Defence, **[38]**). They are not "*inchoate*" (AS[61], [64]) or "*opaque*" (AS[20]). Moreover, the Appellant has not challenged the Judge's findings of fact in this regard on appeal.

19. The Appellant nevertheless contends that the Judge erred in finding that the New Rule sought to protect the Respondents' legitimate interests: Notice of Appeal, para. 1. The basis for this appears from AS[20] to be a challenge to the Judge's reasoning relating to the negative associations for the NRL Competition that are created when its high-profile players are charged with serious offences like aggravated sexual assault in company.

20. With respect, this does not make sense. The Appellant is here questioning the reasoning process that led the Judge to find that the New Rule was reasonable to protect the legitimate interests identified. But that is a different question from whether there were legitimate interests to protect in the first place. There has never been any challenge by the Appellant to the existence of the legitimate interests that the Respondents sought to protect,[10] or that the Respondents

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9 Confidential Exhibit R7, tab 3 [**Pt B tab 43.3, 6**].

10 See the Appellant's Outline Submissions at trial, para. 54 [**Part B tab 43, 16-17**].

were honestly seeking to protect them: see J[225]. The first Ground of Appeal must fail for this reason.

E. GROUND 2: REASONABLENESS

(1) The applicable test

21. To be lawful, a restraint of trade must be adjudged to be reasonable by reference to the interests of the party seeking the benefit of it, in this case the Respondents (see J[208]-[224]). In assessing whether a restraint is reasonable by reference to the interests of the Respondents, it is necessary to assess whether there is a "*clear and present danger*" to those interests, or whether the danger is only "*remote or conjectural*": see *Adamson v New South Wales Rugby League Limited* (1991) 31 FCR 242 at 295 per Gummow J; J[245], [267]. This must be assessed, of course, from the perspective of the person imposing the restriction.

22. None of this disputed by the Appellant on appeal. It is necessary to emphasise, however, in light of the tenor of some of the Appellant's submissions (e.g. AS[36], [51], [55], [61], [62], [63]) that it was not necessary for the Respondents to show that significant harm would have befallen them had the New Rule not been put in place. It is a question of risk. The Respondents are not required to play roulette with the interests of the game of Rugby League in this country or to wait until the horse had bolted. Rather, the question is whether a reasonable person in the Respondents' position would have identified a clear and present danger to those interests.

23. The Appellant suggests that the Judge "*inverted*" the "*onus of proof*" when assessing reasonableness (AS[64]). This mischaracterizes Her Honour's approach. The Judge was at all times conscious of the party who bore the onus of proof: J[7], [211], [224], [228], [257].

(2) Fan and community concerns resulting from allegations against NRL players

24. The Appellant suggests (AS[22]-[42]) that the Judge overstated the reaction that many members of the community would have to the series of player behaviour incidents that had arisen since 2015, including the serious charges against Mr de Belin. There is no basis for this criticism.

25. The core of the Appellant's attack on the Respondents' case, and the judgment, is that the Respondents were contending that by reason of the Appellant's charge members of the public "*would think – despite the presumption of innocence – that Mr de Belin sexually assaulted the complainant*" (AS[6], [11], [24]). This is a false target. This is not, and has never been, the Respondents' submission, nor was it the reasoning adopted by the Judge.

26. It is important, therefore, to identify the Judge's reasoning with clarity. The Judge concluded

that, at a minimum, although aware of the presumption of innocence, a reasonable person "*may*" think that there is a "*reasonable and probable basis for the charge*" against Mr de Belin, and therefore "*a risk that he is guilty*" (J[260]). There was a "*risk of alienating fans*" if Mr de Belin and others in his position were allowed to continue to play (J[263(2)]).

27. Before considering the Appellant's specific complaints in this regard, a reality check is important. Is the Appellant really suggesting that the fact of his charge, and the reporting of the "*shocking*" allegations against him, have not damaged his reputation? Is it seriously being suggested that, at present, there is no risk that people have a lesser opinion of him than prior to the publication of these matters?

28. This was certainly not the view of the Rugby League Players' Association (**RLPA**) when making representations to the Respondents about the proposed New Rule on the behalf of players such as Mr de Belin. As the RLPA put it "*[n]o doubt any person facing criminal charges will be affected by the stigma that will attach as a result of the charges*".[11] In considering people in positions of power in corporations, government and inside sport, the RLPA said (although attempting to distinguish them from the Appellant) *"[c]harges levelled at a person in such a position will have a direct and significant bearing on the public trust and confidence in that organisation and/or person…".*

29. It is common sense to conclude that there is a risk that a reasonable person, when faced with the reporting that was occurring in respect of NRL players, including Mr de Belin, would think that there was a risk that the person was guilty, that the person was associated with the acts of which he is accused, and that his reputation was damaged as a result. To adopt the language of the one of the line of cases relied on by the Appellant,[12] a "*serious shadow*" is cast over Mr de Belin as a result of the allegations.

30. At AS[23]-[**29**] the Appellant takes issue with the Judge's approach to *Mirror Newspapers Limited v Harrison* (1982) 149 CLR 293 (***Mirror Newspapers***). These complaints are unfounded.

31. In *Mirror Newspapers,* Mason J (with whom Wilson J agreed) found (at 303) that a statement that a person had been arrested and charged with a crime conveyed that the person was suspected by police and was also capable of bearing the imputation that the police had a reasonable cause for the charge.

32. The Appellant suggests at **AS**[25]-[**29**] that this view is wrong. However:

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11 RLPA letter of 21 February 2019, Exhibit R2, tab 27 p. 669 [**Pt B tab 38.29, 669-671**].

12 *Farshchi v Medial Board of Australia* [2018] VCAT 1619 at [122].

(1) It bears emphasis the Judge's conclusion at J[260] was simply that a reasonable member of the public may think there is a reasonable basis for Mr de Belin's charge. That is, it is open to members of the public to think that. This is different from whether a reasonable person would necessarily reach this conclusion.[13]

(2) This is the orthodox view in this area.[14] Indeed, the authorities go further and find that the reporting of a charge may, depending on the circumstances, carry with it an imputation of guilt: *Malcolm v Nationwide News Pty Ltd* [2007] NSWCA 254 at [15], [16].

(3) In *Mirror Newspapers,* Gibbs CJ expressly reserved his position, and so cannot be said to have "*disagreed*" with Mason J in any respect (and the Judge was correct to so find: J[258]). In any event, Gibbs CJ agreed that a statement of charge would convey to a reasonable person that the police suspected that the person had committed the offence (at 295). His Honour simply held that it "*did not necessarily*" (emphasis added) follow that the statement would convey that the police had reasonable grounds for the charge and therefore left that question open.

(4) The Appellant suggests at AS[21], [28] that Mason J and/or the Judge failed to take proper account of the presumption of innocence. This is baseless. Mason J expressly noted the point (at 300-**301**) and the Judge emphasised it throughout the judgment: J[137], [258], [260]. In any event, it is incorrect to say that a reasonable person is necessarily mindful of the presumption of innocence whenever accusations or allegations are made: *John Fairfax Publications Pty Limited v Obeid* (2005) 64 NSWLR 485; [2005] NSWCA 60 at [**70**] per McColl JA (with whom Sheller JA and McClellan AJA agreed).

33. At AS[31] the Appellant also criticizes the Judge's conclusion that a reasonable person may think that there is a reasonable and probable basis for the charge. This is unfounded. The Appellant overlooks that this language derives from the tort of malicious prosecution. The meaning of "*reasonable and probable cause*" is addressed in [27.10] and [27.50] of *Fleming's Law of Torts* (10th ed, 2011), as cited to the Judge. As the authors note, "*there is no distinction between [the adjectives "reasonable" and "probable"], their conjunction being a heritage from old-pleading redundancies*".

34. At AS[33] the Appellant criticizes the Judge's reliance on the tort of malicious prosecution. There is no basis for this criticism. The Judge was not asserting that the tort somehow formed an alternative remedy for Mr de Belin. Rather, the Judge found (J[258]) that the tort exists

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13 See, for example, *Malcolm v Nationwide News Pty Ltd* [2007] NSWCA 254 at [14]-[22].

14 See, generally, Gatley on Libel and Slander (12th ed., 2013), para. 3.28.

because the announcement that a person has been charged with an offence has the inherent potential to cause serious damage to that person's reputation, and it is that reputation that a person prosecuted improperly would seek to vindicate by bringing such a claim.

35. In *Mirror Newspapers,* Mason J also found that a charge by police and prosecutors would convey to a reasonable person that they had reasonable cause to believe he had committed the offence (which, as noted above, was left open by Gibbs CJ). The Judge also endorsed this finding at J[258]. That accorded, as the Respondents had explained, with the requirements placed on prosecutors before bringing proceedings[15] and the fact that such reasonable cause is required lest prosecutors not be exposed to a claim in the tort of malicious prosecution.[16] The correctness of this finding on the facts of the present case is also reinforced by the context:

(1) There can be little doubt that, as the Judge found at J[261] (and which is not subject to any challenge by the Appellant), the public's perception of the behaviour of players in the NRL Competition was affected by the constant allegations of misbehaviour against players over the previous three years, and in particular during the "*Summer of Hell*".

(2) In Mr de Belin's case, it was reported that the police had stated that they had a "*strong case*" against him (as the Judge noted at J[259]). That reporting carries with it an imputation that there is a strong case, and at the very least one with a reasonable basis. Newspapers repeating these allegations are only protected from a defamation action by reason of the fair reporting defence in s. 29 of the *Defamation Act 2005* (NSW).

(3) The reporting of the circumstances allegedly underpinning the charge in vivid and unpleasant detail (see J[140], [259]) further increases the likelihood of a reasonable person concluding that there is a reasonable basis for the charge.[17] By contrast, the fact that Mr de Belin was granted bail (AS[30]) does not assist him. There is no evidence of any basis to impute to a member of the public a knowledge of matters taken into account in granting and refusing bail. In any event, the reasons for bail reported in Mr de Belin's case had nothing to do with any lack of strength of the prosecution case.[18]

36. The Appellant contends that the pre-amble to the New Rule is in some way inconsistent with the above: AS[6], [22], [24], [32]. This is misconceived:

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15 Respondents' Closing Submissions, para. 93 **[Pt B tab 48, 29]**.

16 Fleming's Law of Torts, [27.50].

17 *Malcolm v Nationwide News Pty Ltd* [2007] NSWCA 254 at [16].

18 See, for example, the *Sydney Morning Herald* report at R2, tab 4 **[Pt B tab 38.4, 50]**.

(1) The pre-amble to the New Rule was one part of a much wider corpus of evidence that was before the Judge going to the reasonableness of the New Rule. There was no cross-examination or exploration at trial of any of the Respondents' witnesses on its content.

(2) The pre-amble simply provides that it is "*open*" to the public, media and partners of the NRL to reach the conclusion that something has occurred which police reasonably believe warrants the charge. Contrary to AS[24], there is no suggestion in that pre-amble that anyone thinks a person charged with an offence has necessarily committed that offence.

(3) The New Rule is one that, obviously, only applies to players in the NRL Competition. In this context, contrary to the approach at AS[22], the mere fact of the charge cannot be looked at in isolation. As the Judge found (and is not challenged), the NRL Competition is a high-profile and highly-publicised form of entertainment, in which the players operate as role models and their image is commodified: J[**105**]-[108], [262]. Any charge against a player is likely to be subject to extensive reporting and debate, and any consideration of the possible reaction of members of the public must be viewed in that context.

(4) Of course, a suggestion that there is a suspicion that a person has committed an offence may also carry with it the sting that the person has done something to bring suspicion on himself: e.g. *Greig v WIN Television NSW Pty Ltd* [2009] NSWSC 632 at [81] per McClellan CJ at CL. But this is not something that was explored at trial or relied on by the Judge.

(5) Contrary to AS[32], there is no difference in rationale between the automatic component of the New Rule and the discretionary component. There is no basis, therefore, for the allegation of "*irrationality and inconsistency*", and certainly no basis for criticising the Judge for failing to address whether there was when the point was never put to Her Honour.

37. Further, Mr Greenberg and Mr Abdo gave evidence about how they perceived the damage to Mr de Belin's reputation and they were not challenged on this evidence.[19] These experienced administrators of the game can be expected to have a good understanding of how the fans and commercial partners that they deal with on a daily basis perceive the game and its players.

38. Finally, it would be damaging to Mr de Belin's reputation (in the sense of lowering him in the estimation of ordinary right-thinking members of the community) even only to suggest that he was suspected of a crime. It does not appear to be in dispute, at least, that this implication follows from the reporting of his charge (AS[28]).

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19 E.g. Greenberg, para. 65 [**Pt B tab 7, 10**].

39. Moreover, in seeking to undermine the Judge's conclusions as to what the community thought about the problem of player behaviour in the NRL Competition, the Appellant ignores the evidence of the position of the NRL's community partners, White Ribbon and One Watch. As the Judge found at J[146], White Ribbon raised concerns with the NRL shortly after the charge against Mr de Belin was laid, stating that it was "*concerned about the recent trend of allegations of abuse against multiple NRL Players, and believe the alleged behaviour is unacceptable*". Following the adoption of the New Rule, White Ribbon commended the decision and observed that it showed the NRL's "*commitment to zero tolerance for any kind of abuse, disrespect or violence against women*": J[199] Our Watch commended the NRL on its "*courageous*" leadership, and stated that it felt that the NRL had "*come up with a proposal that is fair and serves to make a clear statement to all*": J[200].

40. The Appellant also complains of the Judge's reliance on the communications from fans dealt with in Mr Greenberg's evidence: AS[37]-[38]. The Appellant's summary of this evidence and the Judge's findings in relation to it is inaccurate:

(1) The Judge did not find, contrary to AS[38], that there was an "*'overwhelming' public opinion in favour of standing down Mr de Belin*". Rather, Her Honour found (J[263(2)]) that there was a "*real risk of alienating members of the public who were fans*" if Mr de Belin was not stood down. This was supported not only by the correspondence from fans (as the Appellant wrongly suggests at AS[38]), but also from the other evidence referred to by the Judge.

(2) The Judge did find (J[150]) that prior to the new policy being announced, the emails relating to Mr de Belin were "*overwhelmingly in favor*" of standing down players charged with serious offences. This was obviously right. 83% of those emails clearly supported the stand down of players charged with serious criminal offences.[20] Of the communications concerned with player behaviour more generally, virtually all of them made clear that the number of player behaviour issues were unacceptable and that further action needed to be taken.[21] The Appellant notes that many of the emails do not mention Mr de Belin by name (AS[37], [38]), but it is not clear what is said to turn on this.

(3) As Mr Greenberg said in evidence, and as the Judge found, the emails referred to in **Mr** Greenberg's evidence were a "*balanced and representative sample*" of those received (J[149]). As the Judge noted, Mr Greenberg was "*cross-examined at some length*" on this issue (J[149]). As to the complaint in AS[38], the Appellant had the opportunity to cross-examine Mr

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20 Exhibit R2, tab 6 [**Pt B tab 38.6**].
21 Exhibit R2, tab 7 [**Pt B tab 38.7**].

Greenberg about whether this was a "*valid statistical sample*" (whatever that may mean in the present context) but chose not to do so.

(4) But in any event this misses the point. These emails did not purport to be the product of a survey designed to satisfy an expert statistician. They simply demonstrated the sorts of views that were being expressed to the Respondents before the new policy was adopted. The Judge noted that some fans were against Mr de Belin being stood down (J[150]). The Judge's point was not that there was unanimity of view, but that there was a clear risk of alienating many fans if no action was taken. This conclusion is unimpeachable.

41. As to the decline in the sales of team jerseys referred to in AS[39], the Appellant attacks Mr Abdo's methodology for determining the 18% drop in sales or the accuracy of the figures, but again this is something that Mr Abdo was cross-examined about at length and the Judge accepted Mr Abdo's evidence. Moreover, it was the Appellant who chose to issue a subpoena to the Appellant's Club seeking further evidence about these figures, and then cross-examine Mr Abdo about them. Further, the Appellant's assertion that there was no comparison with jersey sales of other clubs is wrong: in his affidavit Mr Abdo compared the 18% drop in St George-Illawarra jersey sales to an 8.7% drop in other Clubs' jersey sales.[22]

42. The Appellant also contends at AS[40] that the Judge was wrong to find that the allegations against Mr de Belin and others may deter women from playing the game, and may deter parents from encouraging their children to play. This was the view of Mr Greenberg, derived from his experience in speaking to fans and participants in the game at the grass roots level: J[153]. There is no basis for thinking that Mr Greenberg had somehow got it wrong, not least because in light of the other findings this is exactly the position one would expect these participants and potential participants to take: see, e.g., J[260], [263(1)].

43. Finally, in relation to the Net Promotor Score (**NPS**) data, the Appellant again mischaracterizes the Judge's findings at AS[41]. Contrary to the Appellant's submissions, the Judge did not find that the NPS data was as important consideration for the Respondents. Rather, the Judge found that the Negative Impact Report (which was expressly separate from that research – see J[186]-[187]) was an important consideration. Contrary to the last sentence of AS[41], the Negative Impact Report did not rely on NPS data about loss of fans as a result of player behaviour. In any event, as the Judge did not rely on the NPS data (e.g. J[154]), it is impossible to see how Her Honour's judgment can be criticized on this basis.

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22 Abdo 1, para. 77 [**Part B tab 10, 18**].

(3) The attitude of sponsors

44. The Appellant challenges the Judge's findings on the risks posed to the NRL's interests relating to sponsors at AS[42]-[52]. Before considering the extensive evidence relating to the attitudes of specific sponsors, it is noted that the Judge made various findings of fact, none of which are challenged on this appeal, that make the conclusion that the Respondents were right to identify clear dangers arising from sponsor concerns following the events of late 2018 and early 2019 almost inevitable. These findings are passed over by the Appellant. They are as follows:

(1) The Respondents, the financial viability of the NRL Competition, and the success of the game of rugby league in Australia are all dependent on revenue from fans and commercial partners: J[41], [104], [105]. The success of the game therefore depends on the NRL Competition being attractive to spectators, television viewers and sponsors: J[109].

(2) This is the source not only of the funds needed to maintain the NRL Competition and fund the grass roots level of the game, but also of the money used to pay the players. The interests of the players (considered as a whole) and the Respondents are not in opposition to each other but, rather, are aligned: J[106], [107], [111].

(3) The Australian sporting market is a highly competitive one. Sponsors have no shortage of high-profile sporting events and competitions to which to attach their brands: J[108].

(4) The revenue generated from sponsorship and advertising is determined by the perception that sponsors and advertisers have of the NRL Competition: J[119]. Sponsors seek positive associations for their brands: J[119]. For this, amongst other reasons, players are contractually obliged to maintain a good reputation when they apply to participate in the NRL Competition: J[**61**], [101].

(5) Sponsors are very sensitive to negative associations: J[120]. (The Appellant challenges the Judge's findings on the admissibility of the evidence of Mr Abdo to which the Judge referred in this regard.[23] However no proper explanation of his challenge is set out. In any event, the point was also made by Mr Alavy in his evidence, on which he was not cross-examined and the admissibility of which is not challenged on appeal[24]).

(6) There is a very strong identification between the players in the NRL Competition and the sponsors of the NRL Competition: J[119]. For example, the Telstra logo is incorporated

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23 Notice of Appeal, Schedule B [**Pt A tab 12, 14**].

24 Alavy, paras. 71-**75** [**Part B tab 8, 16-17**].

into every player's jersey.

(7) If it is reported that the players in the NRL Competition have behaved inappropriately, or have been accused of such behaviour, this creates a negative association between the sponsor and the competition in which these players play: J[121], [128], [129].

45. One would expect as a matter of logical inference and common sense, therefore, that in the environment that existed in 2018/2019 sponsors would be highly concerned, would be pressuring the Respondents to take action, and would be contemplating moving their money elsewhere. It is obvious that this was a clear danger to the Respondents' interests. The evidence provided further confirmation that this was the case. Seven examples that were before the Judge are considered below. This evidence is largely passed over by the Appellant.

46. **Telstra:** [redacted][30]

47. **NIB**: Prior to the policy change the CEO of NIB (Mark Fitzgibbon) emailed Mr Greenberg to state that his view was now that players in the position of Mr de Belin should be stood down pending the determination of his charge, as a result of the clear association between the player

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25 Abdo 2 (Conf), para. 6 **[Part B tab 9, 2]**.

26 Abdo 2 (Conf), para. 7 **[Part B tab 9, 2]**.

27 Confidential Exhibit R7, tab 1 **[Part B tab 43.1, 1]**. No limitation was imposed on this evidence, a decision that is not challenged by the Appellant on this appeal.

28 Abdo 2 (Conf), paras. 8-9 **[Part B tab 9, 2-3]**. While this particular oral communication was subject to a s. 136 limitation, the critical point was that this is what was being communicated to the Respondents (a non-hearsay use).

29 Confidential Exhibit R7, tab 7 **[Part B tab 43.7„28].** No limitation was imposed on this evidence, a decision that is not challenged by the Appellant on this appeal.

30 Abdo, para. 68 **[Part B tab 10, 16]**, Exhibit R6, p. 1916. No limitation was imposed on this evidence.

and NIB's logo in photos printed in the media.[31] The Appellant's response at AS[49] is simply to say that Mr Fitzgibbon had not stated expressly that NIB's sponsorship was at risk. But that is no answer at all. Any fair reading of Mr Fitzgibbon's email makes it plain that he was communicating that the NIB sponsorship was at risk if something was not done.

48. [redacted]

49. [redacted]

50. [redacted]

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31 Judgment, [157]; Greenberg, [104] **[Part B tab 7, 16]**; Exhibit R2, pp. 609, 609A **[Part B tab 38.20, 609]**.

32 Confidential Exhibit R7, tab 3 **[Part B tab 43.3, 5-7]**. There was no limitation on any of this evidence and that is not challenged.

33 Confidential Exhibit R7, tab 3 **[Part B tab 43.3, 5-7]**. No limitation was imposed on this evidence.

34 Confidential Exhibit R7, tab 2 **[Part B tab 43.2, 2-4]**. No limitation was imposed on this evidence.

35 Abdo 2 (Conf), para. 11. Although this latter evidence was subject to a s. 136 non-hearsay limitation, its relevance is not whether or not Mr Aquilina believed the truth of what he was saying (even though there is no reason to doubt that) but rather the fact that this was the view being communicated to the NRL.

36 Confidential Exhibit R7, tab 5 **[Part B tab 43.5, 10-11]**.

51. [redacted]

53. The Appellant contends at AS[46] that the Respondents should have summonsed these sponsors as witnesses. This is untenable. As the Judge found, there was no basis for thinking these individuals were in the Respondents' "camp", such that a *Jones v Dunkel* inference would be appropriate: J[248]-[249]. Moreover, the idea that the Respondent should further damage its relationship with these sponsors by involving them in these very high-profile proceedings is commercially unsound. In any event, the suggestion that they could be shown to be lying or mistaken such that their organisations were – in fact – not concerned by the allegations and charges against Mr de Belin and other players at all, is highly improbable. The reaction of these

37 Abdo 2 (Conf), para. 16 [**Part B tab 9, 4**]; T-335.33 [**Part B tab 48.2**].
38 Confidential Exhibit R7, tab 5[**Part B tab 43.5, 10-11**].
39 Confidential Exhibit R7, tab 5[**Part B tab 43.5, 10-11**].
40 The admissibility of the report was specifically considered by the Judge who admitted it for all purposes: T-186.12-**17** [**Part B tab 40**].

sponsors, as recorded in the evidence before the courts, was entirely to be expected.

54. At AS[47] the Appellant also criticizes the Judge's findings about sponsor concerns at J[156] on the basis that they related to concerns raised prior to Mr de Belin being charged. This is a baseless criticism. The Judge expressly identified that this is what that paragraph was addressing: "*Even before the reports of Mr de Belin's Court appearance, sponsors were expressing concerns about player behaviour to the NRL...*". The Appellant then simply ignores the rest of the Judge's reasoning and evidence about subsequent concerns of sponsors (including that at J[157]-[159]).

55. The Judge was therefore correct to find that reasonable people in the position of Mr Greenberg and Mr Abdo, and the Board of the Respondents, would consider that there was a clear and present danger to the Respondents' interests if nothing was done.

(4) The attitude of broadcasters

56. The Appellant contends at AS[53] that there was no evidence on which the Judge could find that broadcasters had concerns about the risk of a negative impact on ratings as a result of player behaviour incidents. This is wrong:

(1) Senior executives of both the NRL's free-to-air broadcaster, Nine Entertainment Ltd, and the owner of its subscription partner, News Limited, expressed their concern to the Respondents that the charges laid against Mr de Belin would have a negative impact on upcoming season's ratings and would significantly dilute future broadcast values.[41]

(2) As Mr Greenberg and Mr Abdo explained in evidence on which they were not challenged, the amount that broadcasters are willing to pay for broadcasting rights depends on their view of the likely ratings: J[116], [117]. Moreover, as explained above, it would make perfect sense for a commercial partner of the NRL to be concerned about the extent of the allegations being made and the impact of that on brand perception: see also J[255(6)].

(3) The Appellants contends at AS[53] that evidence of these views was subject to a s. 136 limitation. Again, this is wrong. While Mr Greenberg's affidavit evidence was subject to such a limitation, the documentary evidence tendered was not. [redacted]

41 J[157], [263(3)]; Greenberg, [94] [**Part B tab 7, 14-15**].

[redacted]

(4) However even if some of the evidence was subject to a non-hearsay use limitation, it would make no difference. The key question is what broadcasters were telling the Respondents, and therefore both how those broadcasters were likely to behave in any future negotiations, and how a reasonable person in the Respondents' position would perceive the dangers faced by the NRL. Whether the Court concludes that these individuals were expressing honest concerns is irrelevant, albeit there was no basis to suggest otherwise.

57. The Appellant contends at AS[53] that it did not know the names of the individuals at Nine and News who expressed these views. Again, this is wrong. Those names were apparent from the face of the material before the Board which were discovered and in evidence.

58. The Appellant complains at AS[53] that the Respondents did not call [redacted] as witnesses. Again, this is a submission of little or no weight. Plainly, it would risk further damage the Respondents commercial interests to seek to force key representatives of its broadcast partners to give evidence in highly publicized proceedings such as these.

59. The Appellant also contends at AS[53] that there could be no impact on broadcast values because the current contract did not expire until 2022, and "*the determination of Mr de Belin's innocence or guilt would occur years prior to the rights being negotiated*". This assertion is inconsistent with the Appellant's case that he does not know when his charge will be determined, such that the stand down is effectively indeterminate. In any event, a prudent administrator of the game would not ignore these views, and such conduct would be calculated to weaken the NRL's bargaining position in any future negotiations, particularly where the broadcaster would risk losing sponsorship and advertising revenue in the meantime. These partners provide approximately $360 million in revenue to the NRL every year (J[104]). Their concerns would constitute a clear danger to the Respondents' interests that a responsible administrator would want to address.

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42 Confidential Exhibit R7, tab 5 [**Part B tab 43.5, 10-11**]. The admissibility of the report was specifically considered by the Judge who admitted it for all purposes: T-186.12-**17** [**Part B tab 40**]. There has been no challenge to that ruling.

43 Exhibit R2, tab 21 [**Part B tab 38.21, 610**]. This evidence was not subject to any limitation.

60. Contrary to the Appellant's submission at AS[53], there was evidence showing an escalation of concerns by broadcasters following the Appellant's Court attendance on 12 February 2019. Prior to that Court attendance, there is no evidence of any such concerns being expressed to the NRL, while following it there was evidence of significant concerns being raised.

(§) The attitude of the Clubs

61. The Judge found at J[160] that representatives from a number of NRL Clubs were reporting to the NRL that they were struggling to sell key sponsorship properties and that they considered this to be a likely consequence of the reporting of player misconduct issues, including the reporting of the charge against Mr de Belin.

62. The Appellant does not challenge the Judge's findings that this message was communicated to the NRL in those terms. Rather he complains at AS[55] that some of this evidence was the subject of a s. 136 limitation, that there might have been other reasons why sponsors were not interested in sponsoring the Clubs and that it had not been shown that there were sponsors who would have provided sponsorship but for charged players being permitted to play.

63. These criticisms are not good ones. First, there was extensive evidence from Mr Campbell, the Chairman of the Melbourne Storm NRL Club that was not subject to any limitation. Mr Campbell gave evidence at trial and the Appellant had the opportunity to cross-examine him. His evidence was considered by the Judge to be "*particularly compelling*": J[164]. Moreover, it was also not in dispute that 15 out of the 16 NRL Clubs supported the Respondents' decision: J[184], [193(5)]. Plainly, they would not do so unless they thought it was in their interests, and the interests of the game, for that policy to be introduced.

64. In any event, the critical point in assessing the reasonableness of the Respondents' decision to adopt the New Rule is what was being reported to the NRL, rather than whether or not what the representatives of the Clubs were saying was true (although, again, there is no reason to doubt their honesty).

65. Further, it was never in dispute that there may well be many factors that are relevant to a sponsor's decision to sponsor a Club, and Mr Abdo accepted that such factors may arise in relation to the examples given in this case: J[162]. This does not mean that there was no clear danger to the Clubs, and the NRL Competition, as a result of player misconduct issues.

66. Finally, it is again worthy of emphasis that the question is not whether or not on the balance of probabilities a sponsor would or would not have sponsored the relevant Club absent the

New Rule; rather, it is whether there was a clear danger to the Respondents' interests.

(6) Appellant's challenges to findings on admissibility of evidence

67. The Appellant objects, in a generalized way, to the Judge's decision to admit the items of evidence identified at Schedule B to the Notice of Appeal: Notice of Appeal, para. 1(g); AS[58].

68. This is not an appropriate way of challenging first instance findings on the admissibility of evidence. The Appellant should explain precisely how and why each of the paragraphs he objects to are inadmissible, and why there is a basis for setting the primary judge's findings aside. This is particularly problematic where many of the paragraphs challenged were not even in evidence before the Judge.[44] The objections should be properly explained (which it is presumed will be done in written reply submissions) failing which they should be withdrawn. The suggestion **at** AS[58] that the Appellant has "*noted in detail above*" how the challenged paragraphs of Mr Greenberg's or Mr Abdo's evidence are based on speculation or hearsay is unfounded. There is no explanation of this in the Appellant's submissions.

69. The Appellant contends at AS[58] that the Judge thought it was an "*answer*" to supposed problems with the evidence that Mr Greenberg's and Mr Abdo's evidence constituted a reliable account of the conversations that these individuals had and that no *Jones v Dunkel* inference was appropriate. This is a further mischaracterization. When the Judge made those findings, Her Honour was dealing with specific complaints on these particular matters made by the Appellant: J[247]. It is the Appellant who has missed the point in this respect.

(7) Effect of New Rule in disassociating the NRL from the alleged behaviour

70. The Appellant contends at AS[61] that the New Rule does not disassociate the NRL from the alleged behaviour, and at AS[62] would not prevent reputational damage to the game. This was contradicted by the evidence, as set out above. In summary, there is a clear association between players and the NRL Competition as a whole, and a clear association between players and sponsors: e.g. J[101], [102], [119], [120]. When a player is charged with a criminal offence, that inevitably creates a negative association between the allegation, the player, the NRL Competition and the sponsor: e.g. J[121], [128], [129]. Standing the player down removes the possibility of these associations arising. It is for this reason that the NRL's commercial and community partners supported the New Rule, and reacted positively to its introduction.

71. The Appellant also asserts at AS[75] that the particular restraint on him was not directed to any

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44 Abdo 1, paras. 41-42; Campbell, paras. 13, 15, 23; Greenberg, para. 69.

other incident in the "*Summer from Hell*". It is true that Mr de Belin was the only one subject to an automatic rather than a discretionary stand down because of the seriousness of the offence with which he was charged. The various other players charged were subject to a discretionary stand down. It is not clear where this takes the Appellant.

72. The Appellant also complains at AS[75] that the New Rule did not catch some other incidents arising in rugby league that relate to player behaviour. However, it is plainly possible for the New Rule to have a clear effect in disassociating the NRL from poor player behaviour in circumstances where it is not a panacea for every problem faced by the sport.

(8) Effect of the New Rule on curbing player behaviour

73. The Appellant contends at AS[63] that it is "*nonsensical*" to suggest that the New Rule might address the impact of poor player conduct, and allegations of poor player conduct, on the sport, even though it cannot be said to guarantee that players will not engage in such behaviour.

74. There is nothing objectionable in this. As the Judge noted, these are "*plainly distinct and separate propositions*": J[304(2)]. The NRL has many programs in place to attempt to prevent poor behaviour before it happens. However, those programs were inadequate to prevent reputational damage associated with players being charged with serious criminal offences. There is no reason why the NRL should be prohibited from doing anything to prevent or limit the reputational damage to the game arising from charges of misconduct.

(9) The nature of the restraint on the Appellant

75. The Appellant makes a series of complaints in relation to the Judge's findings on the impact of the restraint at AS[65]-[71]. The premise of these findings is that the Judge held that the impact of the restraint on him was "*ameliorated*" by certain matters (AS[65], [69]) and therefore that the restraint was reasonable (AS[69]). In fact, the Judge did not find this at all. Rather, Her Honour found that the fact that Mr de Belin could continue to train, and would continue to be paid, ameliorated his position "*to some degree*" (J[231]) and that the restraint was reasonable in light of the extent of impact on Mr de Belin which the Judge expressly recognised.

76. The Appellant contends at AS[67], [69] that the Judge should have found that he would suffer "*professional and economic sterlisation*" as a result of the stand down. There was no basis for this. The Appellant is (and will continue to be) paid over $500,000 a year. Further, his manager (Mr Gillis) accepted in evidence that, even absent the stand down, he would not be able to negotiate

any renewal with his club, or any contract with any other club, until his charge was determined.[45] It was never asserted that Mr de Belin would not play again if he is acquitted. Moreover, any suggestion as to what might happen in a year or two years' time if Mr de Belin is acquitted is entirely speculative and no evidence is cited to support it.

77. The Appellant notes at AS[68] that, in some situations, a player may be stood down where he does not have two years to run on his contract. This is not the Appellant's situation, and therefore it is irrelevant to whether the restraint on him is lawful by reason of s. 4 of the *Restraints of Trade Act 1976* (NSW). But, in any event, the evidence of Mr Gillis was that no player subject to a serious charge like Mr de Belin's would be offered a contract by any club, regardless of a stand down. The hypothetical is therefore not only irrelevant but inapposite.

78. The Appellant contends at AS[5], [68] that the New Rule means he cannot play not only in Australia, but also in New Zealand and Europe. There was no evidence to the effect that those controlling the game in Europe would prevent Mr de Belin from playing in any competition because of his having been stood down under the New Rule. But this is irrelevant in any event. As the Judge held at J[230], as a result of the Appellant's charge his passport was confiscated. He is therefore unable to leave the country, regardless of the existence of the New Rule.

79. As to whether the Appellant has suffered any loss,[46] he contends at AS[70] that he has lost the opportunity to play State of Origin this year. The Appellant did not plead any entitlement to loss of chance damages, and this was not articulated in any of his submissions at trial. In any event, the Appellant ignores the key aspect of the Judge's reasoning in this regard. The question was not simply whether he would be selected based on his playing quality; the Judge held at J[236] that there was no evidence as to what stance the NSWRL Board or the NSW State of Origin selectors would take to someone, like Mr de Belin, charged with a serious criminal offence. There was no basis at all for thinking Mr de Belin would even be considered for representative selection by those third parties while facing serious criminal charges.

(10) Length of restraint

80. The Appellant contends at AS[72] that the Judge erred at J[126] in finding that the restraint was for a defined period. However the Appellant does not then go on to engage with the Judge's (correct) reasoning that this is a finite, not indefinite stand down, and thus not the same as that

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45 T-77.10-**15** [**Part B tab 45.2**].

46 Contrary to AS[70], the burden was on Mr de Belin to establish loss, in order to make out his causes of action in misleading and deceptive conduct, unconscionability and interference with contract: see Order 12.04. **19.**

imposed in *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10.

81. The Appellant says at AS[73] that the stand down is "*far longer than the typical contractually agreed employment restraint*". The Appellant does not set out any evidential support for this contention, and there was none at trial. It is, in any event, wrong, as even restraints that much longer than 1 to 2 years have been consistently upheld as valid.[47]

82. The Appellant also complains at AS[19], [73] that Rule 22A(15) confirms that if a player is acquitted this does not prevent the NRL from taking further action against the player. This provision presently has no application to Mr de Belin because his charge has not been determined and is therefore irrelevant. In any event, the sub-rule makes sense. A player may be acquitted of a serious offence but, in doing so, may admit behaving (or be found to have behaved) in a way that may or may not require further action under the Code of Conduct.

(11) Retrospectivity

83. The Appellant contends at AS[74] that the Judge erred in finding that the "*retrospectivity*" of the rule did not make it unreasonable. However, the Appellant does not engage with any of the Judge's reasoning at J[280]-[282], which was obviously correct. There are many situations in which a new law or rule will apply to a state of affairs existing at the time of the change but be unobjectionable.[48] There was nothing unfair in the New Rule applying to players who had already been charged with an offence.

(12) The automatic nature of the stand down

84. The Appellant asserts at AS[12] that there is "*no cogent reason*" why a player charged with a very serious offence is automatically stood down, without a right of appeal, whereas for less serious offences the stand down is discretionary, and subject to appeal.

85. This is wrong. As the Judge found at J[299], when a player is charged with an offence punishable by 11 years' imprisonment in more, it is – by its nature – a very serious offence (examples were given in the Respondents' submissions).[49] The Respondents were entitled to adopt a bright line rule in this regard, not only to reflect the seriousness of such offences, but also to send a clear message regarding the NRL's future attitude to such matters. Where offences carry a term of imprisonment of less than 11 years, it may or may not be the case that

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47 See, for example, Heydon, The Restraint of Trade Doctrine (4th ed, 2018), pp. 180-186.

48 The position was well articulated by the United Kingdom Supreme Court in *AXA General Insurance Limited and others v The Lord Advocate* [2012] 1 AC 868 at [120] per Lord Reed.

49 See Respondents' Closing Submissions, para. 92 [**Part B tab 48, 29**].

the seriousness of the charge justifies the stand down. That is a matter for the CEO's discretion.

86. The Judge correctly found that it made no sense for the NRL to conduct its own investigation into the allegations. Not only was the NRL ill-equipped to do so, but it would give rise to a clear risk of contempt of court: J[290]-[292]. Moreover, there is an air of unreality to the Appellant's suggestion at AS[77] that the NRL should determine whether there is a credible basis for the charge when this has already been done by prosecutors.

87. The Appellant complains at AS[76] that there is also a risk of contempt in respect of less serious offences. This may well be right, although it would depend on the particular offence. However, the Appellant's complaint presupposes that there will be such an investigation in those cases simply because the stand down is not automatic. This was not explored in cross-examination or otherwise at trial, but in any event is not a safe assumption. The critical question in the context of the discretion will be whether the offence charged justifies the stand down, not the veracity of the allegations underlying the charge.

88. The Appellant also asserts at AS[77] that the Judge found that if someone in Mr de Belin's position was granted a right of appeal, the only matters that they could properly address would be financial and emotional impact and suggests that this is wrong because the person might choose to challenge the basis for the charge. This is a mischaracterization. The Judge found that it would not be sensible to explore the basis for the charge in light of the NRL's inability properly to do so and the risk of contempt: J[290]-[292]. Given the limitations upon any investigation and determination by the NRL of the subject matter of the charge, it is improbable in the extreme that the NRL, acting reasonably, would ever seek to second-guess the police investigation and the decision made by the DPP. Emotional and financial impact were the only matters that had been suggested by Mr de Belin at trial that did not go into these issues: J[303]. However, it is improbable to think that such features could ever outweigh the fact that a player had been charged with such a serious offence.

89. Further, it is naïve to suggest at AS[77] that the risks of contempt or interference with the administration of justice could be avoided by not having a "*highly publicized*" or "*formal*" determination by the NRL. As this case demonstrates, widespread publicity is probable where an NRL player is charged with a serious criminal offence. If, following a "secret" hearing, there is a determination either way, that determination will be obvious to members of the public. If the player continues to play, it is plain that the NRL considers that the charges are ill-founded. If the player is stood down, it is plain that the NRL considers the charges have substance.

90. Finally in this regard, there can be little doubt that, had the Respondents adopted a rule that required the basis of the charge to be explored before a stand down could be imposed, the Appellant would now be complaining that such a rule interfered with his right to silence and prejudiced the criminal process. Indeed, in the RLPA's letter to the NRL of 21 February 2019, it asserted that "*there is a very real risk that by making a determination to suspend Jack ahead of the criminal proceedings, the ARLC/NRL may be interfering with the administration of justice and prejudicing Jack's right to a fair hearing*".[50] This recognizes the reality that there can be no investigation of the facts underlying the allegations against Mr de Belin by the Respondents that does not potentially interfere with the criminal process.

(13) Supposed limits on possible amendments to the NRL Rules

91. The Appellant contends at AS[78]-[79] that the primary judge erred in not finding that there was a limit on the NRL's power to amend its rules, and that it could not validly amend those rules in a way that is arbitrary, capricious, unfair, unreasonable or subverts "*a central purpose of a playing contract*". The Appellant contends that the New Rule offends these limits.

92. The Judge was right to find that this claim was not pleaded: J[324]. Indeed, the Appellant himself expressly disavowed a claim that the New Rule was invalid for this reason in submissions following trial.[51] In any event, there is nothing to suggest that the rule was arbitrary, capricious, unfair, unreasonable or subverted the playing contract. The playing contract did not give the Appellant an unrestricted right or obligation to play; rather, it was a right to play subject to the rules of the NRL Competition: J[237], [320]-[327].

(14) Guidance from other contexts

93. The Appellant suggests at AS[81] that there was no precedent for the New Rule in other sporting codes. This presupposes that those other codes have taken the correct approach on this issue, which is not necessarily correct, especially in light of changing community values. In any event, the rules of these other codes all permit a standing down where there is a criminal charge (which, on the Appellant's reasoning, should be impermissible): J[294].[52] The central point of contrast is that the standing down in those other codes is discretionary in <u>all cases</u>, without any distinctions being made in relation to very serious offences. But that is not necessarily inconsistent with the Respondents' rule that those charged with very serious criminal offences should be stood down; for there to be any inconsistency it would have to be

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50 RLPA letter of 21 February 2019, Exhibit R2, p. 669 [**Part B tab 38.29, 669-671**].

51 Email from Robert Tassel dated 26 April 2018, 1.45pm [**Part B tab 52**].

52 See also Respondents' Closing Submissions, para. 111(4)-(8) [**Part B tab 38.29, 34-35**].

concluded that these sports would not choose to stand down someone charged with such a serious offence. The Respondents are not aware of anything that would suggest this.

94. As the Judge noted at J[295], the same concern that underlies the New Rule also underlies the right of an employer at common law to suspend an employee on full pay for a defined period pending the conclusion of an investigation into allegations of misconduct.[53] The Appellant challenges this at AS[82] on the basis that the NRL is not the Appellant's employer. It is correct that the Club employs Mr de Belin, not the NRL. But the NRL sets the rules for participation in the NRL Competition and, by its efforts, sources the funding that is then passed on to Clubs to enable them to pay players. If the Appellant is right, the Clubs would have the power to stand down players pending the resolution of charges, but the NRL would be prohibited from taking a uniform approach. That cannot be right.

95. The Appellant says at AS[82] that there are "*myriad*" examples from other contexts where a stand down pending the resolution of criminal charges is only permitted in "*rare*" circumstances or where there is a risk to the public. The supposed "*myriad*" is not identified. Only one "*example*" is given in the Appellant's submissions, which is a decision of VCAT concerning a statutory provision regulating medical practitioners (the *CJE* case). Apart from being a split (2:1) decision ([77]-[78], [124]-[134]), the *CJE* case bears little resemblance to the present and turned on a question of fact as to whether the willingness of members of the public to seek appropriate treatment would be significantly undermined if the public was aware of the charges laid against the doctor ([9]). The Tribunal did not think this was established. By contrast, in another decision, *Farshchi v Medial Board of Australia* [2018] VCAT 1619, the Tribunal concluded (unanimously across seven members: [21]-[25]) that the doctor should be stood down pending the resolution of the charge due to the "*shadow*" it cast over his practice. Each case depended on its own facts.

96. The Appellant also seeks at AS[83] to draw an analogy with cases where legal practitioners have returned to practice following convictions for sexual offences. The regime relating to the suspension of legal practitioners where allegations of misconduct are made was not relied on by the Appellant or considered in evidence at trial. But in any event, this analogy is also inapposite. The question of whether a person is "*fit and proper*" one to be admitted to legal practice, some time after their punishment and rehabilitation has been completed, and with the

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53 See *Downe v Sydney West Area Health Service (No 2)* [2008] NSWSC 159; (2008) 71 NSWLR 633 at [414] and [422] (Rothman J); *Avenia v Railway & Transport Health Fund Ltd* [2017] FCA 859; (2017) 272 IR 151 at [164]-[165] and [174] (Lee J); see also A Stewart, Stewart's Guide to Employment Law (6th ed, 2018) at [12.18].

result that, if they are not fit and proper, they are barred for life, bears little relationship to whether the standing down of players such as Mr de Belin for a defined period is a legitimate step to take to address clear dangers to the Respondents' legitimate interests.

(15) Other suggested options for the NRL

97. The Appellant says at AS[85] that there were many other options available to the Respondents to meet the dangers they faced. These options were not explored in evidence or cross-examination at trial, with the result that their feasibility could not be explored with the Respondents' witnesses. In any event, the options suggested by the Appellant only serve to confirm that no other (sensible) option was available to the Respondents.

98. The suggestion that the logos on Mr de Belin's clothing could be masked or otherwise covered up is, with respect, absurd. This would not prevent him being associated with the NRL Competition and its sponsors, whether to viewers at the game or watching a broadcast. If anything, it would serve to draw greater attention to players in this position. Furthermore, such a suggestion ignores the sponsorship on signage at the grounds or associated with television broadcasts. That cannot be selectively masked.

99. As to the idea that alcohol advertising could have been reduced at the games, there was no basis to suggest that this would have satisfied the concerns of sponsors and broadcasters.

100. The Appellant suggests that he could have been prevented from playing representative football. This would not address the dangers to the NRL Competition itself.

101. As to the suggested removal of Mr de Belin from the NRL Player Marketing Fund, this had already been done prior to the adoption of the New Rule.[54] There is no basis for thinking it would have been sufficient by itself to address the problem.

102. As to the suggestion that the NRL should have made a "*strong and forthright*" statements about Mr de Belin's presumed innocence, the NRL's previous position had been essentially that, namely that the players would only be sanctioned if their guilt was determined and would be allowed to participate in the meantime.[55] This, plainly, was not working.

F. GROUND 3: PUBLIC POLICY

103. The Appellant contends at AS[86]-[89] that the New Rule was contrary to public policy (in this

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54 Abdo 1, para. 40 [**Part B tab 10, 10-11**].

55 See, for example, Greenberg, para. 92 [**Part B tab 7, 14**].

regard the burden is on the Appellant: J[211]).

104. First, he contends at AS[86] that the Court should give effect to the presumption of innocence. The scope of this submission is unclear. If the Appellant is contending that the presumption of innocence means the New Rule is contrary to public policy without more, it would mean that it would never be possible to take any action with respect to a person charged with a criminal offence, where that offence is not yet determined before a criminal court. But the Appellant's own argument (e.g. his reliance on *CJE*) is inconsistent with this proposition.

105. Secondly, the Appellant contends at AS[87]-[88] that there was a failure to consult pursuant to the CBA. The Appellant's account of the facts here is materially incomplete. The RLPA was given extensive opportunities to present its views on the (then contemplated) policy change. It participated in the CEO's meeting on 15 February 2019 and indicated its opposition to any changes to the NRL Rules;[56] provided its extensive comments by letter on 21 February 2019;[57] and had a further meeting with the NRL on 26 February 2019.[58] It was then given full notice of the Respondents' intention to proceed with the change when it was publicly announced on 28 February 2019, at which point the RLPA put out a press release opposing the change which stated "*[w]hilst we have been consulted, it is obvious that we do not agree to the opposed change*".[59] All of this is ignored in the Appellant's purported summary. It was then given a further opportunity to comment on the specific text of the New Rule on 9 March 2019. The RLPA provided a "*detailed response*": J[204]. Unsurprisingly, its views on the rule had not changed. Further, while a Mr de Belin called Mr Lythe of the RLPA to give evidence, no evidence was given by him (or anyone else from the RLPA) about the supposed inadequacy of the consultation: J[306].

106. Thirdly, the Appellant contends at AS[89] that the CBA prohibited changes to the NRL Rules where those changes were inconsistent with the CBA or the NRL Playing Contracts. The supposed inconsistency of the New Rule with the Appellant's playing contract was dealt with in detail in the Judge's rejection of the Appellant's claim of tortious interference with contract, which is not appealed: J[320]-[327]. Moreover, the Appellant never identified, at any stage, the term(s) of the CBA or the NRL Playing Contracts with which the New Rule was said to be inconsistent. This is particularly problematic where, as the Judge found, the NRL Playing Contracts contemplated changes to the NRL Rules (and the Clubs and players agreed to be bound by those changes), and the CBA itself sought to maximize the financial strength of the

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56 Greenberg, para. 132 [**Part B tab 7, 24**].
57 Exhibit R2, p. 669-671 [**Part B tab 38.29, 669-671**]; J[185].
58 See letter from the NRL to the RLPA dated 9 March 2019, Exhibit R2, p. 672 [**Part B Tab 38.31, 672**].
59 Exhibit R2, tab 28 [**Part B tab 38.33, 681-683**].

game, which the New Rule helped to achieve: J[111], [237], [304(2)], [320]-[327].

107. In any event, even if there had been a breach of the CBA, it is not clear why this would mean the New Rule was contrary to public policy. This has never been explained by the Appellant.

G. GROUND 4: ALLEGED UNCONSCIONABLE CONDUCT

108. The Appellant's claim of unconscionable conduct should be rejected for the reasons given in the judgment: J[382]-[404]. The Appellant would only add the following brief observations.

109. The Appellant's claim as pleaded was reliant in large part on his claims that the Respondents had engaged in misleading and deceptive conduct and had interfered with the Appellant's playing contract.[60] However, the Judge's rejection of those claims has not been appealed.

110. There were no "*unfair tactics*". There was extensive consultation with the RLPA (well before 9 March 2019) and a direct conversation between the Appellant and the Respondents on 27 February 2019. The suggestion that the meeting with Mr Greenberg was in some way unfair does not bear scrutiny in circumstances where Mr de Belin attended with his manager, Mr Gillis (who gave evidence, but did make any complaint about the meeting), and Mr Brian Johnson (the head of Mr de Belin's Club, which opposed the rule change).

111. The Judge was well aware of the respective bargaining positions of the parties: J[228(2)].

112. The suggestion that the Respondents could not adopt the New Rule because it would create an inconsistency between how previous situations were dealt with is misconceived. Were it otherwise, it would never be possible for the Respondents to change the NRL Rules.

H. CONCLUSION

113. For the reasons set out above and in the judgment, the appeal should be dismissed and the Respondents should be awarded their costs. In the event that, contrary to the Respondents' submissions, the appeal is allowed, then the Respondents should not be ordered to pay the whole of the Appellant's costs of the proceedings in the Court below. Considerable time, both in preparation and hearing, was devoted to issues on which the Appellant failed (the misleading and deceptive conduct and interference with contract claims) and which he chose not to appeal.

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26 July 2019

60 Amended Statement of Claim, paras. 25(d), (e), (m), 25A [**Part A tab 5, 10-12**].

Federal Court of Australia **No. NSD 903 of 2019**
District Registry: New South Wales
Division: General
On appeal from the Federal Court of Australia

Jack de Belin
Applicant
Australian Rugby League Commission Ltd ACN 003 07 293 and another
Respondents

RESPONDENTS' CHRONOLOGY

Date	Event	Ref
13 February 2017	Commencement date of Appellant's playing contract.	J, [55].
13 February 2017	Appellant applies to be registered as a player in the NRL Competition.	J, [60].
1 November 2017	Term Sheet for new CBA agreed.	J, [64].
4 September 2018	Pictures are published of players from NRL Club Canterbury Bulldogs dancing nude during "Man Monday" celebrations. Two players plead guilty to willful and obscene exposure.	Exhibit A11.
30 September 2018	Jarryd Hayne accused of sexual assault. Charged with aggravated sexual assault and pleads not guilty.	Exhibits A10 and A11.
24 November **2018**	Zane Musgrove and Liam Coleman involved in an alleged incident at a Coogee hotel. Both plead not guilty to indecent assault.	Exhibits A**10** and A11.
6 December 2018	Dylan Walker charged with common assault arising from a domestic violence incident.	Exhibit A11.
13 December 2018	Mr de Belin charged with aggravated sexual assault in company.	Exhibits A10 and A11.
18 December 2019	ALRC Board meeting. Board resolved **to** conduct an audit into whether the current steps taken by the game to combat violence against women were adequate.	J, [132].
19 December 2019	White Ribbon publicly announces its concerns in relation to the recent trend of allegations of abuse against multiple NRL players.	J, [146].
7 January 2019	Scott Bolton pleads guilty to common assault after	Exhibit A11.

	grabbing a women's upper thigh at a Sydney bar.	
21 January 2019	Teleconference between Mr Greenberg, and Club CEOs and captains in relation to reducing player behaviour incidents.	J, [134].
1 February 2019	Ben Barba accused of alleged domestic violence and scaked by his Club, the North Queensland Cowboys.	Exhibit A11.
12 February 2019	Appellant appears in Wollongong Local Court and pleads not guilty to charge.	J, [139].
12-13 February 2019	Widespread publication of the details of the allegations made against the Appellant.	J, [139]-[142]
14 February 2019	NRL sponsors directly approached for comment on player behaviour allegations by *Daily Telegraph*.	J, [178].
15 February 2019	Mr Greenberg chairs meeting of the CEOs of the NRL Clubs. Discussion includes player behaviour and culture. Also attended by RLPA.	J, [176].
21 February 2019	RLPA responds to consultation on proposed New Rule.	J, [185].
27 February 2019	Appellant attends meeting with Mr Greenberg, together with his agent, Steve Gillis, and the CEO of his Club, Brian Johnston.	J, [189].
28 February 2019	ALRC Board meeting. Board resolves to adopt new policy standing down players charged with criminal offences. This is then publicly announced.	J, [193].
28 February 2019	RLPA issue press release noting that they have been consulted but opposing the policy change.	Exhibit R2, tab **28**
6 March 2019	Appellant commences proceedings in the Federal Court of Australia (No. NSD 309 of 2019).	
9 March 2019	The Respondents provide a draft of the New Rule to formalize the policy change to the RLPA.	J, [201].
11 March 2019	Letter from the RLPA responding to the NRL's letter of 9 March 2019.	J, [204].
11 March 2019	Amendment to NRL Rules formally adopted.	J, [205].
14 March 2019	New NRL season commences.	
31 October 2020	Termination date of Appellant's playing contract.	J, [55].